

August 25, 2006

**DECISION AND ORDER**  
**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Shearman & Sterling, L.L.P.

Date of Filing: July 14, 2006

Case Number: TFA-0170

On July 14, 2006, Shearman & Sterling, L.L.P. (Shearman) filed an appeal from a determination issued to it on June 6, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI responded to a request for documents that Shearman submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOI determined that it did not have any documents responsive to Shearman's request. This appeal, if granted, would require FOI to perform an additional search and release any responsive documents or issue a new determination justifying the withholding of those documents.

**I. Background**

Shearman filed a request under the FOIA for "all records...relating to the origin, negotiations, and signing of the Energy Charter Treaty (ECT), including but not limited to the development of the U.S. position." Letter from John E. Thompson, Shearman, to DOE (April 7, 2006). FOI forwarded the request to the DOE's Office of Policy and International Affairs (PIA) for a search. According to FOI, the search did not produce any responsive documents. Letter from Abel Lopez, FOI, to John E. Thompson (June 6, 2006) (Determination Letter). As a result, FOI denied the request and Shearman filed the present appeal.

In its appeal, Shearman challenges the adequacy of PIA's search, arguing that "[b]ecause the Department of Energy participated in interagency discussions and discussions with the private sector regarding the [ECT] within the 1990 – 1995 period, it should possess documents regarding the ECT." Letter from John E. Thompson to OHA (July 7, 2006) (Appeal Letter). Shearman also states that documents it received from the Department of Commerce name a Mr. Hank Santiago as the individual who represented the DOE in the discussions pertaining to the ECT. *Id.*

## II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. United States Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. United States Department of State*, 779 F.2d 1378, 1384-85 (8<sup>th</sup> Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted PIA to discuss the initial search. George Kerestes of PIA informed us that Shearman’s original request did not name a particular individual involved in the ECT discussions. Mr. Kerestes stated that the person involved with the ECT was an individual who had since retired, Mr. George Zigler. *See* Memorandum of Telephone Conversation between George Kerestes, PIA, and Diane DeMoura, OHA, July 17, 2006. Mr. Kerestes stated that PIA thoroughly searched Mr. Zigler’s office and files, including paper files, and no documents relating to the ECT were located. Mr. Kerestes noted that in the early 1990s, electronic storage of documents was not as common as it is today and that it is possible that any paper documents that may have existed were not retained. Mr. Kerestes added that he was not aware of any involvement by Hank Santiago, also now retired, in the ECT and, therefore, Mr. Santiago’s files and office were not searched.

Based on this information, we find that PIA conducted a search reasonably calculated to reveal records responsive to Shearman’s initial request and the search, therefore, was adequate. However, based on new information Shearman provided in its appeal – the name of another individual possibly involved in the ECT discussions on behalf of the DOE – PIA has informed us that it is possible that responsive documents may exist. *See* Memorandum of Phone Conversation between George Kerestes and Diane DeMoura, July 17, 2006.

Accordingly, this appeal is granted and this matter is remanded to PIA to complete a new search using the additional information provided in the appeal. After completing its search, PIA is to provide Shearman with any responsive documents or to issue a new determination justifying the withholding of any responsive information.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 14, 2006, by Shearman & Sterling, L.L.P., OHA Case No. TFA-0170, is hereby granted as set forth in paragraph (2) below.
- (2) This matter is hereby remanded to the Office of Policy and International Affairs for further processing in accordance with the instructions set forth in this Decision and Order.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: August 25, 2006